(1)

92-32

No._____

FILED
JUL 2 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

HECTOR ACEVEDO-RAMOS,
Petitioner-Appellant,

-against-

UNITED STATES OF AMERICA,
Respondent-Appellee.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

WILLIAM M. KUNSTLER
Counsel of Record
RONALD L. KUBY
13 Gay Street
New York, New York 10014
(212) 924-5661
Attorneys for Petitioner-Appellant
Hector Acevedo-Ramos

PRINTINGHOUSE PRESS 25 WEST 43RD STREET NEW YORK, NY 10036 (212) 719-3120

QUESTION PRESENTED

Does a simple plea of guilty waive the defense of the statute of limitation?

TABLE OF CONTENTS

Page

Table of Authorities iii

Citation to Opinions Below 1

Jurisdiction 2

Constitutional Provisions and Statutes Involved 2

Statement of the Case 2

Basis for Federal Jurisdiction in the Court of First Instance 4

ARGUMENT 4

THE FIRST CIRCUIT'S HOLDING THAT A SIMPLE PLEA OF GUILTY WAIVES A VALID STATUTE OF LIMITATIONS DEFENSE IS A DECISION AT ODDS WITH EVER OTHER COURT OF APPEALS TO CONSIDER THE QUESTION.

Conclusion 8

Appendix A 1a

Appendix B 8a

TABLE OF AUTHORITIES

Cases	*Page*
Benes v. U.S., 276 F.2d 99 (6th Cir. 1960)	5-6
U.S. v. Akmakjian, 647 F.2d 12 (9th Cir. 1981)	5
U.S. v. Caldwell, 859 F.2d 805, 806 (9th Cir. 1988)	6
U.S. v. Cooper, 956 F.2d 960 (10th Cir. 1992)	5, 8
U.S. v. Del Perico, 870 F.2d 1090 (6th Cir. 1984)	5
U.S. v. Doyle, 348 F.2d 715 (2nd Cir.), *cert. denied*, 382 U.S. 843 (1965)	6
U.S. v. Heidecke, 683 F.Supp. 1215 (N.D.Ill. 1988)	7
U.S. v. Levine, 658 F.2d 113 (3rd Cir. 1981)	6-7
U.S. v. Meeker, 701 F.2d 685, 687 (7th Cir. 1983)	7
U.S. v. Torres Lopez, 851 F.2 520 (1st Cir. 1988)	3, 8
U.S. v. Wild, 551 F.2d 418 (D.C. Cir.), *cert. denied*, 431 U.S. 916 (1977)	7

STATUTES

18 U.S.C. 3231	4
18 U.S.C. 3282	2
28 U.S.C. 1254	2
28 U.S.C. 2255	2, 4

In The

Supreme Court of the United States

October Term, 1991

HECTOR ACEVEDO-RAMOS,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner, Hector Acevedo Ramos, herewith prays for the issuance of a Writ of Certiorari to the United States Court of Appeals for the First Judicial Circuit to review its decision of April 9, 1992, denying petitioner's application for a writ of habeas corpus.

CITATION TO OPINIONS BELOW

The opinion of the First Circuit has not yet been reported. It is reproduced here as Appendix (App.) A.

The opinion of the United States District Court for the District of Puerto Rico has not been reported. It is reproduced here as Appendix (App.) B.

JURISDICTION

The judgment of the United States Court of Appeals of the First Circuit was entered on April 9, 1992.

This Court has jurisdiction to review, through certiorari, the decision of the United States Court of Appeals for the First Circuit, pursuant to 28 U.S.C. Sec. 1254.

The United States Court of Appeals from the First Circuit had jurisdiction to hear the appeal from the final order denying petitioner a writ of habeas corpus, pursuant to 28 U.S.C. Sec. 2255.

The final order of the district court was entered on September 17, 1991. The Notice of Appeal and Application for Certificate of Probable Cause were duly filed on September 25, 1991.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

18 U.S.C. Sec. 3282 provides:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

STATEMENT OF THE CASE

On June 26, 1986, Hector Acevedo Ramos and eight others were indicted by a grand jury in the District of Puerto Rico. Acevedo was named in three counts. A superseding indictment was filed on November 24, 1986.

After three days of trial, Acevedo withdrew his plea of not guilty and entered a plea of guilty to counts one and two of the indictment, charging a substantive RICO violation and a RICO conspiracy.

As part of the plea, Acevedo allocuted to two racketeering acts, committed in June, 1980, and March 20, 1981. These acts took place outside of the five-year statute of limitations. He did not expressly waive his right to raise a statute of limitations defense. Indeed, although the plea colloquy was quite lengthy and covered various issues, the issue of the statute of limitations was never raised by the Court, the prosecution, or the defense. Acevedo was never informed of the statute of limitations defect, and was never asked to waive that defect. Acevedo was never informed of a statute of limitations defense, and was never asked to make a waiver of that defense.

On April 9, 1987, Acevedo was sentenced to a fifteen year term of imprisonment on each count, to run consecutively to each other and consecutively with the other sentences that he was serving.[1]

The government drew up the defective indictment and accepted the defective plea based upon an erroneous assumption that the statute of limitations for a RICO offense started from the last act committed by the enterprise, not by the charged defendant. Therefore, in the government's view, a substantive RICO charge could be predicated on racketeering acts that took place beyond the five-year statute of limitations.

This view was rejected by the United States Court of Appeals for the First Circuit in *United States v. Torres Lopez*, 851 F.2 520 (1st Cir. 1988). Subsequently, on the strength of *Torres-Lopez*, Acevedo filed a petition for writ of habeas corpus, requesting that the trial court dismiss count one and vacate the sentence imposed thereon.

The district court denied the petition, and the Court of Appeals affirmed, holding that a plea of guilty, *simpliciter*, was sufficient to

---

[1] Defendant is already serving decades of multiple, consecutive terms of imprisonment for the substantive offenses for which he allocuted, as well as conspiracy to commit those offenses. He has been incarcerated since 1984.

waive the defense of the statute of limitations. The Court of Appeals acknowledged that there was a division between the Circuits on this question.

BASIS FOR FEDERAL JURISDICTION IN THE COURT OF FIRST INSTANCE

The district court had subject matter jurisdiction of the original indictment, pursuant to 18 U.S.C. Sec. 3231, as the indictment alleged defendant's commission of crimes against the United States.

The district court had subject matter jurisdiction over the petition for writ of habeas corpus, pursuant to 28 U.S.C. Sec. 2255, as defendant is in custody pursuant to a court established by the Congress of the United States, and has alleged that said custody was obtained in violation of the Constitution and laws of the United States.

ARGUMENT

THE FIRST CIRCUIT'S HOLDING THAT A SIMPLE PLEA OF GUILTY WAIVES A VALID STATUTE OF LIMITATIONS DEFENSE IS A DECISION AT ODDS WITH EVERY OTHER COURT OF APPEALS TO CONSIDER THE QUESTION.

The courts below denied Acevedo's petition on the erroneous ground that Acevedo, by a guilty plea that did not mention the statute of limitations, waived the statute of limitations defense. But waiver may not be inferred from the mere failure to assert the defense. Prior to this case, every Circuit to consider the question has required, for a waiver to be valid, that the defendant make a knowing and voluntary waiver of the statute of limitations defense, after consultation with counsel. The First Circuit has become the first Court of Appeals to hold that a plea of guilty, simpliciter, waives

the defense of the statute of limitations. This petition for writ of certiorari should be granted to bring the First Circuit into conformity with the other courts of appeals to consider this question.

For a plea of guilty to waive the statute of limitations defense, the waiver must be clear, express, and unambiguous. It must be part of either the plea agreement or the plea allocution. Most recently, in *United States v. Cooper*, 956 F.2d 960 (10th Cir. 1992), the Tenth Circuit rejected the notion that the mere entry of an otherwise valid guilty plea was sufficient to waive a statute of limitations defense. The *Cooper* Court noted that while the defendant could have made a waiver of the defense, she did not do so simply be pleading guilty. The *Cooper* Court held that to allow the government to maintain a prosecution after the period of limitations had expired "simply on the strength of a defendants' notion that a valid charge was pending against her would be to change the statute of limitations from a law into a mere suggestion." 956 F.2d at 962.

The holding in *Cooper* was in accordance with both the holdings and dicta of other courts of appeals to consider the question. In *United States v. Akmakjian*, 647 F.2d 12 (9th Cir. 1981), the Ninth Circuit found waiver after a plea of guilty because the defendant "expressly stated in open court, *apart from his plea of guilty*, that he wished to waive the statute of limitations defense." *Id.* at 14 (emphasis added). The trial court accepting the allocution ascertained that the defendant "knew that the statute of limitations presented a possible defense. . . [and the defendant] expressly waived the defense. . . . " *Id.* at 13.

In the same vein, the Sixth Circuit, recently and for the first time, permitted a waiver of the statute of limitations defense because of the explicit nature of the waiver. In *United States v. Del Perico*, 870 F.2d 1090 (6th Cir. 1984), the Sixth Circuit distinguished its earlier "jurisdictional" view of the statute of limitations defense, articulated in *Benes v. United States*, 276 F.2d 99 (6th Cir. 1960). In *Benes*, the parties:

> [D]id not *explicitly* agree to extend the limitations period. In this case, by contrast, the parties agreed in writing to extend the statute of limitations on *specified* charges for *definite* time periods. Given the parties' agreements in this case expressly addressed the effect that waivers would have on the statute of limitations, we find *Benes* to be factually and legally distinguishable."

870 F.2d at 1093 (emphases in original). The *Del Perico* Court was persuaded to depart from *Benes* precisely because *Del Perico* contained one element that *Benes* lacked — an express waiver of the statute of limitations.

Similarly, in *United States v. Doyle*, 348 F.2d 715 (2nd Cir.), *cert. denied*, 382 U.S. 843 (1965), defense counsel specifically requested a delay in the unsealing of the indictment. The purpose of the delay was to permit the defense to present additional evidence of an alleged immunity agreement, the existence of which would have precluded the prosecution. The agreement was illusory and the defendant's indictment unsealed, after the statute of limitations. There, as here, defendant entered a plea of guilty to one count and proceeded to attack the conviction on appeal. The *Doyle* Court found a valid waiver based upon counsel's request for delay, made with full knowledge of the limitations issue. The Court held that "[e]ven if [statute of limitations] claims are not waived by pleas of guilty *simpliciter*, a defendant advised by counsel can agree so to waive them, and the circumstances compel the conclusion that Doyle did precisely that." *Id.* at 718-719. *See also, United States v. Caldwell*, 859 F.2d 805, 806 (9th Cir. 1988) (Waiver valid where there was a specific agreement to extend the statute of limitations that was sought by defendant and prepared by defense counsel; voluntary and knowing waiver required), *cert. denied*, ___ U.S. ___ , 109 S.Ct. 1173 (1989); *United States v. Levine*, 658 F.2d 113 (3rd Cir. 1981)

(Waiver valid where pre-plea agreement, signed by defendant, expressly advised him of the statute of limitations defense and required an express waiver of the defense); *United States v. Meeker*, 701 F.2d 685, 687 (7th Cir. 1983)(Express, signed waiver giving up right to raise statute of limitations defense), *cert. denied*, 464 U.S. 826 (1983); *United States v. Heidecke*, 683 F.Supp. 1215 (N.D.Ill. 1988)(Waiver valid because of explicit surrender of defense by knowledgeable defendant who had the assistance of counsel.)

Even when a case proceeds through trial, courts have required more than simple failure to raise the defense to constitute a valid waiver of the statute of limitations. In the seminal case of *United States v. Wild*, 551 F.2d 418 (D.C. Cir.), *cert. denied*, 431 U.S. 916 (1977), the defendant, *inter alia*, executed two specific written waivers surrendering his statute of limitations defense. In *Wild*, defense counsel initiated pre-indictment plea bargaining with the government. Two days before the statute of limitations ran, and one day before the indictment was scheduled to be returned, defense counsel contacted the government and "stated that he realized that the statute of limitations would expire in two days, but he nevertheless desired more time to prepare the case and explore a possible disposition . . . ." He then had his client execute two written waivers of the statute of limitations, thereby delaying the grand jury action. 551 F.2d at 420.

Given this factual record, the *Wild* Court quite properly found that defendant had waived this defense. Defense counsel "negotiated for the express written waiver, obviously intending that his client would derive some benefit from it. [The defendant] executed such waiver knowingly and willfully after full consultation with his attorney." *Id.* at 423.

Given the requirement of an express, explicit waiver of a statute of limitations defense prior to a plea of guilty, a review of the record herein demonstrates fatal shortcomings. Nothing in the extensive plea agreement mentioned the statute of limitations. Nothing in the

Court's questioning of the defendant revealed that anyone—the Court, prosecution, defendant, or defense counsel—was even aware of the existence of the defense. And of course, the defendant, during his allocution, said nothing at all about the statute of limitations problem. There is no doubt that Acevedo did not waive his right to present that defense.

In this case, all of the considerations present in *Cooper* are equally present here. The plea allocution was detailed, but it made no mention of the statute of limitations. Neither was the issue raised by counsel for either side. It was not until the First Circuit decided *Torres Lopez*, after Acevedo pleaded guilty, that it became clear that he had such a defense. It is simply not possible to imply to defendant knowledge that he could not have had at the time he entered his plea. Neither does it comport with the purpose of a statute of limitations to permit the government to commence an otherwise time-barred prosecution based upon a specious and contrived view of waiver.

CONCLUSION

Petitioner respectfully prays that the petition be granted.

Respectfully submitted,

WILLIAM M. KUNSTLER
RONALD L. KUBY
13 Gay Street
New York, New York 10014
(212) 924-5661

APPENDICES

APPENDIX A

United States Court of Appeals

FOR THE FIRST CIRCUIT

NO. 91-2074

HECTOR ACEVEDO-RAMOS,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Hon. Jaime Pieras, Jr., *U.S. District Judge*)

Before

Breyer, *Chief Judge,*

Feinberg,* Senior Circuit Judge,

and Cyr, *Circuit Judge.*

William M. Kunstler with whom *Ronald L. Kuby* and *Luis F. Abreu Elias* were on the brief for appellant.

Salixto Medina-Malave, Assistant United States Attorney, with whom *Daniel F. Lopez-Romo*, United States Attorney, was on brief for appellee.

April 9, 1992

* Of the Second Circuit, sitting by designation.

FEINBERG, *Senior Circuit Judge*. Hector Acevedo Ramos appeals from an order of the United States District Court for the District of Puerto Rico, Jaime Pieras, Jr., J., denying Acevedo's petition for post-conviction relief pursuant to 28 U.S.C. §2255. Acevedo was convicted in April 1987, after a guilty plea, on two counts of an indictment charging him with a substantive violation of the Racketeer Influenced and Corrupt Organizations Act (RICO) and a RICO conspiracy. Acevedo was sentenced to 15 years in prison on each count, to be served consecutively, and was ordered to make restitution of over $889,000 to aggrieved victims and to pay a $20,000 fine on each count. Acevedo argues that his conviction for the substantive RICO counts should be vacated and that count dismissed because the indictment was obtained after the statute of limitations had elapsed on the substantive count. For the reasons stated below, we affirm the order of the district court denying Acevedo's §2255 petition.

I. BACKGROUND

Acevedo and other defendants, including Angel Torres Lopez, were indicted in 1986 for violating RICO and for other offenses. All defendants pled guilty except Acevedo and Torres Lopez. Prior to trial, Torres Lopez moved to dismiss the substantive RICO charge as barred by the statute of limitations and, we are told, Acevedo joined in the motion. The district court denied the motion, and Torres Lopez and Acevedo were tried together. After three days of jury trial, Acevedo changed his plea to guilty on the two RICO counts and admitted to committing two of the predicate acts listed in the indictment. During Acevedo's plea allocution, no mention was made of the statute of limitations. The trial of Torres Lopez continued, and he was convicted by the jury of a substantive RICO count and a RICO conspiracy count.

After Acevedo was sentenced, Torres Lopez's conviction for the substantive RICO count was reversed by this court because the

predicate acts for which the jury found him guilty did not take place within the limitations period of five years. United States v. Torres Lopez, 851 F.2d 520, 522-25 (1st Cir. 1988), cert. denied, 489 U.S. 1021 (1989). Based on this ruling, Acevedo brought a motion in the district court, which the district court treated as a petition under 28 U.S.C. §2255, to vacate his sentence on the substantive RICO count. Acevedo argued that, like Torres Lopez, his conviction for the substantive RICO offense should be reversed because the statute of limitations had elapsed on the predicate acts that he had admitted and the district court therefore lacked jurisdiction. The government maintained that Acevedo waived the right to assert a statute of limitations defense by entering a plea of guilty and that in any event the substantive count of the indictment, to which Acevedo pled guilty, charged predicate racketeering acts within the five-year statute of limitations period.

The district court held that the statute of limitations is a waivable affirmative defense that does not affect the subject matter jurisdiction of the court. The court then held that a waiver of a statute of limitations defense can be implied from a guilty plea and need not be explicit. Thus, according to the district court, Acevedo had waived the defense by pleading guilty. The district court did not reach the issue of whether any predicate act in the substantive count to which Acevedo pled guilty was within the limitations period.

II. DISCUSSION

A. Is the Statute of Limitations a Jurisdictional Bar?

The first issue we must decide is whether a criminal statute of limitations is a waivable affirmative defense under any circumstances. Although this court has not yet decided the issue, every circuit that has addressed it has held that the statute of limitations is a waivable affirmative defense rather than a jurisdictional bar. See, e.g., United States v. Karlin, 785 F.2d 90, 92

(3d Cir. 1986) (listing cases), cert. denied, 480 U.S. 907 (1987); United States v. Wild, 551 F.2d 418, 421-25 (D.C. Cir.), cert. denied, 431 U.S. 916 (1977). In fact, one circuit court that had previously held that the statute of limitations was a jurisdictional bar has now changed its position. See United States v. Del Percio, 870 F.2d 1090, 1092-94 (6th Cir. 1989) (narrowing Benes v. United States, 276 F.2d 99, 108-09 (6th Cir. 1960)). Another circuit has recently had that even though the statute of limitations "operates as a bar to prosecution," it can be waived, at least under some circumstances. United States v. Cooper, No. 91-6188, 1992 WL 21808 (10th Cir. Feb. 11, 1992). The court narrowed the scope of Walters v. United States, 328 F.2d 739, 743 (10th Cir. 1964), which had previously been interpreted as holding the statute of limitations affects a court's subject matter jurisdiction.

While the circuit courts have gravitated toward the position that the statute of limitations is a waivable defense, the Supreme Court itself has at least suggested that this is so. In a case involving the return of a state indictment allegedly after the expiration of the statute of limitations, the Court stated: "The statute of limitations is a defense and must be asserted on the trial by the defendant in criminal cases..." Biddinger v. Commissioner of Police, 245 U.S. 128, 135 (1917). We also note that in Wild, the court explained that if defendants can waive certain constitutional rights, such as the right to be represented by counsel, they should be able to waive a statutory right such as the statute of limitations. Wild, 551 F.2d at 424-25. We find the reasoning of the other circuit courts persuasive and hold that the statute of limitations here is a waivable affirmative defense and therefore does not affect a court's jurisdiction.

R. Must the Waiver be Express?

Acevedo argues, as he did in the district court, that even if a statute of limitations defense can be waived, the waiver cannot be inferred from the mere failure to assert the defense, but must be knowing, express and unambiguous. Thus, Acevedo contends, a waiver

cannot be inferred from a guilty plea when, as in his case, no mention was made of the statute of limitations in the plea agreement or in the plea allocation. When courts have allowed a statute of limitations defense to be waived, Acevedo claims, they have only done so because the defendant expressly waived the defense. Acevedo cites language in a number of cases for this proposition. He points to United States v. Akmakjian, 647 F.2d 12, 14 (9th Cir.), cert. denied, 454 U.S. 964 (1981), in which the court noted that the defendant "expressly stated in open court, apart from his plea of guilty, that he wished to waive the statute of limitations defense."

Acevedo also cites, among other cases, United States v. Doyle, 348 F.2d 715, 719 (2d Cir.), cert. denied, 382 U.S. 843 (1965), in which the court stated that: "[e]ven if [statute of limitations] claims are not waived by pleas of guilty simpliciter, a defendant advised by counsel can agree so to waive them, and the circumstances compel the conclusion that Doyle did precisely that." We note, however, that the Doyle court in no way suggested that an express waiver was required and its reasoning did not hinge on the existence of an express waiver. Indeed, it is quite clear that the observation quoted above was an alternative holding and that the Doyle court first held that a guilty plea alone waives the statute of limitations defense. 348 F.2d at 718-19. As Judge Friendly stated for the court: "An unqualified plea of guilty, legitimately obtained and still in force, bars further consideration of all but the most fundamental premises for the conviction, of which the subject-matter jurisdiction of the court is the familiar example. The claims here asserted have nothing of this quality." Id. Thus, the statute of limitations defense, as one of the defendant's claims asserted in Doyle, was barred by the guilty plea alone.

This circuit has not addressed the question whether a waiver of the statute of limitations in a criminal case must be knowing and explicit. However, the Tenth Circuit appears to have held that a guilty plea alone does not waive a statute of limitations defense and

that only an express waiver is sufficient. Cooper, 1992 WL 21808, at *2-*3. Some other circuit courts also appear to emphasize the existence of an explicit waiver. See, e.g., Del Percio, 870 F.2d at 1093; United States v. Caldwell, 859 F.2d 805, 806-07 (9th Cir. 1977), cert. denied, 489 U.S. 1039 (1989); Wild, 551 F.2d at 424.

We respectfully disagree with the proposition that only an explicit waiver of a statute of limitations defense will be effective. It is clear that a plea of guilty to an indictment is an admission of guilt and a waiver of all non-jurisdictional defects. See Valencia v. United States, 923 F.2d 917, 920 (1st Cir. 1991); see also Doyle, 348 F.2d at 713. Although it would have been better practice for Acevedo to specifically waive any possible statute of limitations defense at his plea allocation or in a written document, such a waiver was not required. A judge conducting a plea allocation need not ask defendants about the waiver of every conceivable affirmative defense that might be raised at trial. Counsel for Acevedo, with commendable candor, agreed with this proposition at oral argument but urged that when a specific defense has been raised by motion — as the statute of limitations defense allegedly was here — the situation is different. A waiver of a defense previously asserted, counsel argued, should be made explicit. We disagree. In that situation, there is even less reason to believe that appellant was unaware that he was waiving the defense by pleading guilty.

As the Supreme Court has noted, its "decisions have not suggested that conscious waiver is necessary with respect to each potential defense relinquished by a plea of guilty. Waiver in that sense is not required." United States v. Broce, 488 U.S. 563, 573 (1989). In addition, wee agree with the Fifth Circuit's observation that "if the limitations defense is not jurisdictional,... then it is difficult to conceive why it alone, of all the defendant's affirmative defenses, should not be waived if not asserted at trial." United States v. Arky, 938 F.2d 579, 582 (5th Cir. 1991), (per curiam), cert. denied, 60 U.S.L.W. 3598 (U.S. March 2, 1992) (No. 91-6262).

Thus, like other affirmative defenses, the statute of limitations is deemed waived when a defendant pleads guilty even if the defendant did not make a knowing and express waiver of the defense.

In cases involving somewhat different circumstances from those of a guilty plea, other courts have also found that the statute of limitations defense was waived despite the lack of an express and knowing waiver. For example, in Unites States v. Williams, 684 F.2d 296 (4th Cir. 1982), cert. denied, 459 U.S. 1110 (1983), the defendant was indicted for first degree murder under 18 U.S.C. § 1111 (a). At trial, the defendant requested a charge on the lesser include offense of murder in the second degree and was convicted of this offense. 684 F.2d at 299. On appeal, the court raised the possibility that the lesser offense may have been barred by the statute of limitations. 684 F.2d at 298. Noting, however, that the defendant had requested the lesser included offense charge, the court found that the defendant's "actions obviously constitute a waiver of the time limitation...." 684 F.2d at 299-300. It appears that the defendant made no explicit and knowing waiver of the statute of limitations defense. Nevertheless, the court found that the defendant had waived the defense by requesting a charge on the time-barred offense. See also United States v. DeTar, 832 F.2d 1110, 1115 (9th Cir. 1987) (request for lesser included offense instruction waives statute of limitations defense to that offense). We think a plea of guilty to a time-barred offense similarly waives the statute of limitations defense.

Because we find that Acevedo waived his statute of limitations defense, we need not reach the issue of whether the substantive RICO count to which Acevedo pled guilty included predicate acts that occurred within the statute of limitations period. The judgment of the district court is affirmed.

APPENDIX B

In The United States District Court for The District of Puerto Rico

HECTOR ACEVEDO RAMOS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

CIVIL NO. 90-1716 (JP)

OPINION AND ORDER

The Court has before it petitioner's request for a writ of habeas corpus pursuant to 28 U.S.C. § 2255. Petitioner Hector Acevedo Ramos (hereinafter "petitioner" or "Acevedo") challenges the legality of his confinement, and moves this court for an order dismissing count one of the indictment on which he entered a plea of guilty. He alleges that this Court lacked jurisdiction over the underlying offense because the statute of limitations for the offense had elapsed. For the reasons stated below, the petitioner's request is DENIED.

Acevedo and eight other defendants were tried based on a superseding indictment dated November 24, 1986, that charged various substantive offenses and violations of the substantive and conspiracy sections of the Racketeering Influenced and Corrupt Organizations Act (hereinafter "RICO"). 18 U.S.C. § 1962(c) and (d). Acevedo was named in three counts, involving substantive RICO, RICO conspiracy, and robbery. On the third day of trial on these charges, Acevedo moved to withdraw his plea of not guilty and enter a plea of guilty on the two RICO counts. The plea was

accepted and Acevedo was sentenced on April 9, 1987, to two consecutive terms of 15 years imprisonment and a fine of $20,000.00. Petitioner now seeks to have the substantive RICO conviction vacated so that one of the 15-year terms and the fine are withdrawn.

The basis of petitioners motion is the decision of the First Circuit in *United States v. Torres López*, 851 F.2d 520 (1st Cir. 1988), *cert. denied*, 489 U.S. 1021 (1989), which reversed the conviction by a jury of Acevedo's co-defendant on the parallel charge the petitioner now seeks to upend, on grounds the charge was predicated on racketeering acts that took place beyond the relevant five-year statute of limitations. *Accord* 18 U.S.C. § 3282. [1]

The government opposes the petitioner's motion on both procedural and substantive grounds, asserting first that petitioner, by entering a plea of guilty, waived the right to assert any statute of limitations defense in subsequent or collateral proceedings, and second, that because of various distinctions in the underlying factual circumstances regarding Torres and Acevedo, the Circuit Court's opinion in *Torres* should not be applied to petitioner. Since this court resolves this petition based on the procedural grounds, the substantive grounds will not be discussed.

---

[1] The RICO statute does not set forth its own statute of limitations. Instead, the limitations period is taken from 18 U.S.C. § 3282, which provides a general five-year limitations period for non-capital offenses. *Accord Agency Holding Corp. v. Malley-Duff & Associates*, 483 U.S. 143 (1987). Section 3282 states:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

18 U.S.C. §3282.

It should be noted at the outset that, although the First Circuit has not addressed the issue, every circuit court that has done so has held that criminal statutes of limitation are waivable affirmative defenses that do not affect the subject matter jurisdiction of the courts. *See, e.g., United States v. Walsh*, 700 F.2d 846, 855 (2d Cir.), *cert. denied*, 464 U.S. 825 (1983); *United States v. Karlin*, 785 F.2d 90, 92 (3d Cir. 1986), *cert. denied*, 480 U.S. 907 (1987); *United States v. Williams*, 684 F.2d 296, 299 (4th Cir. 1982), *cert. denied*, 459 U.S. 1110 (1983); *United States v. Del Percio*, 870 F.2d 1090 (6th Cir. 1989) (narrowing scope of *Benes v. United States*, 276 F.2d 99 (6th Cir. 1960), by holding that only a specific agreement between parties to extend limitations period must be explicit);[2] *United States v. Meeker*, 701 F.2d 685, 687 (7th Cir.), *cert. denied*, 464 U.S. 826 (1983); *United States v. Gallup*, 812 F.2d 1271, 1280 (10th Cir. 1987) (re-evaluating position taken in *Waters v. United States*, 328 F.2d 739, 743 (10th Cir. 1964), and stating that "[i]t is well settled that the statute of limitations is an affirmative defense which is waived unless raised at trial."); *United States v. Wild*, 531 F.2d 418, 424-25 (D.C. Cir.), *cert. denied*, 431 U.S. 916 (1977). Petitioner has offered no reasons why this court should depart from this widely held position and the court finds no reason to do so.

Petitioner asserts, however, that even if the limitations defense is waivable, that such a waiver must be voluntary and explicit, not implied from a guilty plea, and that no such waiver exists here. Petitioner cites a series of cases for this proposition, including *United States v. Caldwell*, 859 F.2d 805, 806 (9th Cir. 1988), *cert. denied*, 489 U.S. 1039 (1989); *United States v. Akmakjian*, 647 F.2d 12 (9th Cir.), *cert. denied*, 454 U.S. 964 (1981); *United States v.*

---

[2] Petitioner cites to both *Benes* and *Water*, *infra*, in his Reply Memorandum and suggests that these cases indicate a split among the circuits. As noted, however, both decisions have been either reversed or narrowed, making the opinion among the circuits unanimous.

Doyle, 348 F.2d 715 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965), *Del Percio, supra*, *United States v. Levine*, 658 F.2d 113 (3d Cir. 1981), *Meeker, supra*, *United States v. Heidecke*, 683 F.Supp. 1215 (N.D.Ill. 1988), and *Wild, supra*.

With one possible exception [3], however, the court finds that these cases do not stand for the proposition petitioner contends—*e.g.*, that

---

[3] The possible exception is the Ninth Circuit's decision in *United States v. Akmakjian*, 647 F.2d 12 (9th Cir.), *cert. denied*, 454 U.S. 964 (1981). In this case, the defendant plead guilty to one count of filing false federal income tax returns, despite his earlier assertion that the specific count was barred by the statute of limitations. Before accepting the guilty plea, the district court ascertained that Akmakjian knew that the statute of limitations presented a possible defense to the count to which he was pleading guilty; and, on the record, he expressly waived the defense prior to the court's acceptance of his plea.

Four years later Akmakjian filed a petition under 18 U.S.C. § 2255 to set aside the plea on the ground that the statute of limitations acted as a bar. The court denied the petition, stating:

> Although the indictment here was untimely, Akmakjian's conviction must still stand. The Supreme Court has held that the statute of limitations is an affirmative defense that is waived unless raised at trial. Thus, contrary to Akmakjian's argument, a defense based on the statute of limitations is non-jurisdictional and can be waived. Here Akmakjian expressly stated in open court, apart from his plea of guilty, that he wished to waive the statute of limitations defense. Accordingly, we affirm his conviction.

Id. at 14 (citations omitted). Both petitioner and the government cite to this case as reinforcing their position. The government asserts that it, like the other cases listed, stands for the proposition that a defendant cannot raise the issue of limitations after pleading guilty to the offense in question. Petitioner asserts that it stands for the proposition that a waiver of a limitations defense must by distinct from a plea of guilty to be valid.

Considering the context of the statement and the weight that the other cases give to the government's reading of the case, this court feels that the government's interpretation is correct.

for a waiver of a limitations defense to be valid it must be "a knowing and voluntary waiver..., after consultation with counsel." Defendant's Reply Brief at 2. Instead, they stand for the proposition that *where a waiver is specifically made*, it must be explicit, knowing and voluntary.

The distinction that the Sixth Circuit made between the facts in *Benes*, in which it held the waiver was invalid, and *Del Percio*, in which it held the waiver was valid, is illustrative. In *Benes*, the defendant was charged with tax evasion, but prior to being indicted filed a civil action in federal court seeking to restrain the government from presenting certain evidence to the grand jury. The parties entered into an agreement whereby the government would not present its evidence to the grand jury until the appeals court disposed of the defendant's civil suit. When the civil suit was resolved, the government submitted its evidence, at which time the defendant claimed that the action was time-barred. The government countered that the agreement constituted a toll—a *de facto* waiver—of the limitations period. The court rejected the government's arguments, holding that a statute of limitations

> is not waived by the fact that the prosecution was withheld on account of an agreement with the accused, or by the fact that the accused procured continuances of the preliminary hearing from time to time until the period of limitations had expired

276 F.2d at 109 (emphasis omitted).

In *Del Percio*, the defendant, under indictment for violations of certain provisions of the Atomic Energy Act, as well as for charges of conspiracy and false statements, believing that further inquiry by the government would result in no further charges, signed a series of three 90-day waivers of the relevant statute of limitations. The court held that these explicit agreements signed by the defendant were explicit enough to sustain the waivers and that the period that therefore been properly tolled.

Taken together, these two cases indicate how petitioner's presentation of the caselaw does not hold up. These cases deal with situations in which specific waivers of the statute of limitations were given by the defendant and hold that such waivers must be explicit (in addition to being knowing and intelligent). In this case, we are not dealing with a specific waiver of the statute of limitations. Instead, we are dealing with a plea of guilty and whether or not it constitutes an implied waiver of all non-jurisdictional defenses, including the statute of limitations.

The starting point for this discussion is a statement by the Supreme Court in *Biddinger v. Commissioner of Police*, 245 U.S. 128, 135 (1917), that "[t]he statute of limitations is a defense and must be asserted on trial by the defendant in a criminal case." In *Biddinger*, the court would not allow the defendant to raise the defense of the statute of limitations in a habeas proceeding where he sought to prevent extradition to stand trial on the claim he contended was time barred.

Of course, petitioner Acevedo did not have a full trial because he plead guilty; however, such a plea constitutes a waiver of one's rights to trial, and Acevedo's knowledge of this fact was adduced at the time his plea was accepted. The court asked the defendant;

> **THE COURT:** I have with me your petition to enter a plea of guilty.
>
> The clerk will take the oath of the defendant.
>
> (Whereupon, the defendant is duly sworn by the court clerk.)
>
> **THE COURT:** Now, Mr. Acevedo, did you read all the questions?
>
> **THE DEFENDANT:** Yes, sir. Yes, sir.

THE COURT: Did you consult with your attorney on the context of the questions and their meaning?

THE DEFENDANT: We consult completely, yes, sir.

THE COURT: Are you satisfied that the answer to those questions are the truth?

THE DEFENDANT: The answer of those questions are the truth, yes, sir.

THE COURT: I will repeat some of the questions.

* * *

THE COURT: Do you understand that you have a right to plead not guilty to every charge filed against you?

THE DEFENDANT: I understand that.

THE COURT: Do you remember reading and answering the questions about your right to a jury trial?

THE DEFENDANT: I remember reading and answering my questions, sir, yes, sir.

THE COURT: Do you understand that if your plead guilty, you will be found guilty without a trial?

THE DEFENDANT: I understand that.

* * *

The ultimate question in this case, therefore, involves what rights, defenses, and claims are waived by a guilty plea. As the First Circuit has noted, "[t]he issue of the extent of waiver by a plea of guilty is complex and not free from difficulty." *United States v. DeCosta*, 435 F.2d 630 (1st Cir. 1970). Some circuits have directly addressed the question present here—*e.g.*, whether limitations defenses are waived. For example, the Second Circuit has held, in *United States v. Parino*, 203 F.2d 284, 286-87 (2d Cir. 1953), and *United States*

v. Doyle, 348 F.2d 715, 718 (2d Cir.), *cert. denied*, 382 U.S. 843 (1965), that a defendant *cannot* raise the issue of limitations after pleading guilty to the offense in question. The Court has stated:

> The cases are legion that "[a] plea of guilty to an indictment is an admission of guilt and a waiver of all non-jurisdictional defects.... An unqualified plea of guilty, legitimately obtained and still in force, bars further consideration of all but the most fundamental premises for the conviction, of which subject matter jurisdiction of the court is the most familiar example.

Doyle at 718 (citations omitted).[4] Stating that statutes of limitation are not jurisdictional, the court held that the defense was waived.

The First Circuit has not addressed this issue as directly, but it *has* enunciated a standard that fairly easily revolves this issue. In *United States v. Webb*, 433 F.2d 400 (1st Cir. 1970), *cert. denied*, 401 U.S. 958 (1971), the court held that guilty pleas waive "claims directly related to the determination of guilt or innocence," such as the privilege against self incrimination, the right to a jury trial and the right to confront accusers. In *United States v. DeCosta, supra*, the court explained the line is drawn between "rights directly related to substantive matters that would be presented at trial" versus rights that have "no direct connection to the determination of defendant's

---

[4] As with *Akmakjian*, petitioner finds dicta in *Doyle* to hang his hat on. In the opinion, as noted, the Second Circuit first asserts clearly and strongly that all nonjurisdictional claims are waived by a plea of guilty. Then, in the alternative, the court notes that "[e]ven if such claims are not waived by of guilty simpliciter, a defendant advised by counsel can agree so to waive them, and the circumstances compel the conclusion that Doyle did precisely that." *Doyle*, 348 F.2d at 718. Petitioner asserts that this language suggests that nonjurisdictional claims must be specially waived. Given its context, however, the language, and therefore the case, do not appear to present a particularly stable peg for petitioner.

guilt or innocence." In *DeCosta* itself, the defendant was attempting to claim his right to a speedy trial was violated. The court noted that this non-substantive right was different than those at issue in *Webb* and that it should be a waste of judicial to require defendant to go through with a trial to protect his right to appeal the issue.

The statute of limitations, at issue here, cannot be said to fall squarely in the range of either substantive or non-substantive rights. It certainly is not as substantive as the right to jury or the right to confront accusers; however, it is a matter that would have been—or at least should have been—raised at trial had the defendant not pleaded guilty. Again, given the prevailing view that limitations defenses are waived if not raised at trial, and the Supreme Court's strong language in *Biddinger*, this court holds that such claims *are* substantive and were impliedly waived by Acevedo upon his plea of guilty. The convictions therefore stand and the petitioner's request for a writ is denied.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 16 day of September, 1991.

/s/Jaime Pieras
JAIME PIERAS, JR.
U.S. DISTRICT JUDGE

Supreme Court, U.S.
FILED
AUG 12 1992
OFFICE OF THE CLERK

No. 92-32

In the Supreme Court of the United States

OCTOBER TERM, 1992

HECTOR ACEVEDO-RAMOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

THOMAS M. GANNON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether petitioner waived his statute of limitations defense by his plea of guilty.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	5
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Benes v. *United States*, 276 F.2d 99 (6th Cir. 1960)	10
Biddinger v. *Commissioner of Police*, 245 U.S. 128 (1917)	5
Capone v. *Aderhold*, 65 F.2d 130 (5th Cir. 1933)	5
United States v. *Akmakjian*, 657 F.2d 12 (9th Cir. 1981)	9
United States v. *Arky*, 938 F.2d 579 (5th Cir. 1991), cert. denied, 112 S. Ct. 1268 (1992)	7
United States v. *Broce*, 488 U.S. 563 (1989)	6
United States v. *Caldwell*, 859 F.2d 805 (9th Cir. 1988), cert. denied, 489 U.S. 1039 (1989)	10
United States v. *Cook*, 84 U.S. (17 Wall.) 168 (1872)	5
United States v. *Cooper*, 956 F.2d 960 (10th Cir. 1992)	5, 8
United States v. *Del Percio*, 870 F.2d 1090 (6th Cir. 1989)	10
United States v. *DeTar*, 832 F.2d 1110 (9th Cir. 1987)	7, 9
United States v. *Doyle*, 348 F.2d 715 (2d Cir.), cert. denied, 382 U.S. 843 (1965)	7, 9, 10
United States v. *Karlin*, 785 F.2d 90 (3d Cir. 1986)	5
United States v. *Levine*, 658 F.2d 113 (3d Cir. 1986)	10
United States v. *Meeker*, 701 F.2d 685 (7th Cir.), cert. denied, 464 U.S. 826 (1983)	5, 10
United States v. *Minor*, 756 F.2d 731 (9th Cir. 1985), vacated, 474 U.S. 991 (1985)	10
United States v. *Torres Lopez*, 851 F.2d 520 (1st Cir. 1988), cert. denied, 489 U.S. 1021 (1989)	3

Cases—Continued: Page

United States v. *Walsh*, 700 F.2d 846 (2d Cir. 1983) 5
United States v. *Wild*, 551 F.2d 418 (D.C. Cir.), cert. denied, 431 U.S. 916 (1977) 5, 10
United States v. *Williams*, 684 F.2d 296 (4th Cir. 1982), cert. denied, 459 U.S. 1110 (1983) 5, 7
Valencia v. *United States*, 923 F.2d 917 (1st Cir. 1991) ... 6-7
Waters v. *United States*, 328 F.2d 739 (10th Cir. 1964) ... 5

Statutes:

18 U.S.C. 1962(c) 2
18 U.S.C. 1962(d) 2
28 U.S.C. 2255 3

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-32

HECTOR ACEVEDO-RAMOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 961 F.2d 305. The opinion of the district court (Pet. App. 8a-16a) is reported at 787 F. Supp. 16.

JURISDICTION

The judgment of the court of appeals was entered on April 9, 1992. The petition for a writ of certiorari was filed on July 2, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following his plea of guilty in the United States District Court for the District of Puerto Rico, petitioner was convicted of participating in the conduct of

the affairs of an enterprise, in violation of the RICO statute, 18 U.S.C. 1962(c) (Count 1), and of conspiring to commit that offense, in violation of 18 U.S.C. 1962(d) (Count 2). The district court sentenced him to consecutive terms of 15 years' imprisonment on each count, to be served consecutively to sentences imposed in two other cases. The district court also fined petitioner $40,000 and ordered him to make restitution in the amount of $889,089.30. Petitioner subsequently moved for post-conviction relief. The district court denied the motion, Pet. App. 8a-16a, and the court of appeals affirmed, *id.* at 1a-7a.

1. On June 26, 1986, a federal grand jury returned a five-count indictment charging petitioner and eight others with substantive and conspiracy violations of the RICO statute. The charges, which involved conduct that began in October 1973 and continued into 1985, identified 18 predicate racketeering acts: seven murders, six armed robberies, one kidnapping and extortion, one theft from interstate commerce shipment, two arsons, and one attempted obstruction of justice. On November 24, 1986, the grand jury returned a superseding indictment that corrected typographical and technical errors in the earlier indictment, but did not materially alter the charges against petitioner and his co-defendants. Gov't C.A. Br. 3-4.

All of the defendants except petitioner and Angel Torres-Lopez pleaded guilty. Prior to trial, Torres-Lopez moved to dismiss the substantive RICO charge as barred by the statute of limitations. Petitioner joined in the motion. Pet. App. 2a. After the district court denied the motion, the trial of petitioner and Torres-Lopez began on January 27, 1987. Days later, petitioner entered an unconditional plea of guilty to Counts 1 and 2 of the indictment. Gov't C.A. Br. 4.

Petitioner's counsel described the plea as "the only solution." C.A. App. 162.

During the plea proceeding, petitioner admitted committing two of the predicate acts listed in Count 1, the armed robbery of a jewelry store in April 1980 and the armed robbery of a diamond manufacturing plant in March 1981. C.A. App. 166-167. The government proffered, as a factual basis for the plea, evidence that petitioner had participated in six of the racketeering acts alleged in Count 1, including a kidnapping and extortion in September 1982. *Id.* at 173-178; see *id.* at 128-129. The statute of limitations was not discussed during the plea colloquy. Pet. App. 2a; see C.A. App. 159-181. On April 9, 1987, petitioner was sentenced. *Id.* at 221.

2. The jury convicted Torres-Lopez on the substantive RICO charge and the RICO conspiracy charge, and he appealed. More than a year after the district court sentenced petitioner, the court of appeals reversed Torres-Lopez's conviction on the substantive RICO count, holding that the predicate acts for which the jury found him guilty did not take place within the five-year limitations period. *United States* v. *Torres Lopez*, 851 F.2d 520, 522-525 (1st Cir. 1988), cert. denied, 489 U.S. 1021 (1989). Petitioner then filed a motion, which the district court treated as a motion for post-conviction relief under 28 U.S.C. 2255, to vacate his sentence on the substantive RICO count. Petitioner claimed, like Torres-Lopez, that his substantive RICO conviction should be reversed because the statute of limitations had expired on the predicate acts that he had admitted committing. In response, the government contended that petitioner, by his guilty plea, had waived the statute of lim-itations defense, and that in any event Count 1 of the

indictment charged predicate racketeering acts that fell within the limitations period. Pet. App. 2a-3a.

The district court ruled that the running of the statute of limitations does not affect the subject-matter jurisdiction of the court and that a statute of limitations defense is waived unless it is affirmatively asserted. Pet. App. 10a. The court further held that a waiver of a statute of limitations defense need not be explicit but can be inferred from a guilty plea. *Id.* at 10a-16a. The court then concluded that petitioner had waived the defense by pleading guilty. *Id.* at 16a. In light of that holding, the court did not reach the question whether the predicate racketeering acts charged in Count 1 fell within the limitations period. *Id.* at 9a.

3. The court of appeals affirmed. Pet. App. 1a-7a. The court first held that the statute of limitations "is a waivable affirmative defense and therefore does not affect a court's jurisdiction." *Id.* at 4a. The court also concluded that a waiver of the defense need not be explicit; rather, "like other affirmative defenses, the statute of limitations is deemed waived when a defendant pleads guilty even if the defendant did not make a knowing and express waiver of the defense." *Id.* at 7a. The court noted that because petitioner had raised the statute of limitations issue by motion before entering his plea, "there is even less reason [than in the ordinary case of a guilty plea] to believe that [petitioner] was unaware that he was waiving the defense by pleading guilty." *Id.* at 6a. Having found that petitioner had waived the limitations defense, the court did not address the question whether the predicate acts charged in Count 1 of the indictment occurred within the limitations period. *Id.* at 7a.

ARGUMENT

Petitioner contends (Pet. 4-8) that the court of appeals erred in holding that his guilty plea waived a defense based on the statute of limitations, and he argues that the decision below conflicts with decisions of other courts of appeals. Those contentions are without merit and do not warrant this Court's review.

1. The court of appeals correctly held that the running of the statute of limitations does not defeat a trial court's jurisdiction. Rather, it is an affirmative defense that is waived if it is not raised before or during a defendant's trial. See, *e.g.*, *United States* v. *Karlin*, 785 F.2d 90, 92 (3d Cir. 1986); *United States* v. *Walsh*, 700 F.2d 846, 855 (2d Cir. 1983); *United States* v. *Williams*, 684 F.2d 296, 299 (4th Cir. 1982), cert. denied, 459 U.S. 1110 (1983); *United States* v. *Wild*, 551 F.2d 418, 422 (D.C. Cir.), cert. denied, 431 U.S. 916 (1977); *Capone* v. *Aderhold*, 65 F.2d 130, 131 (5th Cir. 1933); see also *Biddinger* v. *Commissioner of Police*, 245 U.S. 128, 135 (1917); *United States* v. *Cook*, 84 U.S. (17 Wall.) 168, 178 (1872). To benefit from a limitations defense, a defendant must affirmatively assert it. *United States* v. *Meeker*, 701 F.2d 685, 687 (7th Cir.), cert. denied, 464 U.S. 826 (1983).[1]

Petitioner suggests, however, that even if the statute of limitations defense is not jurisdictional, the defense can be raised through a collateral attack on a

[1] The only decision suggesting that the statute of limitations defense is jurisdictional, *Waters* v. *United States*, 328 F.2d 739, 743 (10th Cir. 1964), is of no assistance to petitioner. *Waters* held only that the statute of limitations could be raised for the first time on appeal, not that it could be used to attack a guilty plea collaterally. In any event, the Tenth Circuit has since rejected the view that the running of the statute of limitations defeats a court's subject-matter jurisdiction. *United States* v. *Cooper*, 956 F.2d 960, 962 (10th Cir. 1992).

guilty plea unless the record shows that the defendant knowingly and intentionally waived the defense when he pleaded guilty. Pet. 5. That claim is strikingly similar to the claim that this Court rejected in *United States* v. *Broce*, 488 U.S. 563, 573 (1989). In that case, after Broce had pleaded guilty, a defendant in a parallel criminal prosecution prevailed before the court of appeals on a claim that a comparable indictment should be dismissed on double jeopardy grounds. Broce sought to rely on that decision in moving to vacate his guilty plea; he asserted that he had never intentionally relinquished (or even been aware of) his double jeopardy claim. This Court disagreed that such specific relinquishment was required:

> Our decisions have not suggested that conscious waiver is necessary with respect to each potential defense relinquished by a plea of guilty. Waiver in that sense is not required. * * * In sum, as we explained in *Mabry* v. *Johnson*, 467 U.S. 504, 508 (1984), "[i]t is well settled that a voluntary and intelligent plea of guilty by an accused person, who has been advised by competent counsel, may not be collaterally attacked." That principle controls here.

488 U.S. at 573-574. In light of *Broce*'s holding that a constitutional claim is relinquished by a guilty plea despite the absence of an express waiver, petitioner's contention that a statute of limitations defense cannot be relinquished by a guilty plea absent an express waiver necessarily fails.

Broce's holding follows from the nature of a guilty plea and the strong societal interest in protecting the finality of convictions. A plea of guilty constitutes an admission of guilt and a waiver of all non-jurisdictional defects in the prosecution. *Valencia* v. *United*

States, 923 F.2d 917, 920-921 (1st Cir. 1991); *United States* v. *Doyle*, 348 F.2d 715, 718 (2d Cir.) (cases "are legion" holding that a plea waives non-jurisdictional defenses), cert. denied, 382 U.S. 843 (1965). A district judge conducting a plea allocution is not required to ask a defendant about the waiver of every conceivable defense that might be raised at trial; if that were the rule, no plea agreement would ever be sufficient to protect against a subsequent collateral attack. Thus, the limitations defense, like other affirmative defenses, "is deemed waived when a defendant pleads guilty even if the defendant did not make a knowing and express waiver of the defense." Pet. App. 7a; *United States* v. *Doyle*, 348 F.2d at 719 (unqualified plea of guilty bars consideration of limitations defense); cf. *United States* v. *Arky*, 938 F.2d 579, 582 (5th Cir. 1991) (finding no reason why a statute of limitations defense "alone, of all the defendant's affirmative defenses, should not be waived if not asserted at trial"), cert. denied, 112 S. Ct. 1268 (1992).[2]

In any event, even if it were necessary to establish a knowledgeable waiver, petitioner's guilty plea, after he had joined co-defendant Torres-Lopez's unsuccessful statute of limitations motion in the district court, would appear to satisfy that showing. When a defense has previously been raised in a case, only to be abandoned by the defendant's knowing and voluntary decision to plead guilty, there is "even less reason to believe that [he] was unaware that he was waiving the

---

[2] The limitations defense has been deemed waived in situations not involving a guilty plea, despite the lack of an express and knowing waiver. See *United States* v. *Williams*, 684 F.2d 296, 299-300 (4th Cir. 1982) (request for lesser-included offense instruction on allegedly time-barred charge waives limitations defense), cert. denied, 459 U.S. 1110 (1983); *United States* v. *DeTar*, 832 F.2d 1110, 1115 (9th Cir. 1987) (same).

defense by pleading guilty" than there would have been if the defense had never been raised. Pet. App. 6a.

2. Petitioner contends (Pet. 5-8) that the decision in this case conflicts with the decisions of other circuits, which he asserts have required an express waiver in order to relinquish a statute of limitations defense. Although there is language in some decisions that supports petitioner's position, there is no conflict in the circuits warranting this Court's review.

In *United States* v. *Cooper*, 956 F.2d 960 (10th Cir. 1992), the court of appeals allowed a defendant who had pleaded guilty to raise a statute of limitations defense because there had been no "express waiver" of that defense. *Ibid.* The facts of *Cooper*, however, are quite different from the facts here. In *Cooper*, the defendant pleaded guilty pursuant to a plea agreement reached before the statute of limitations had run; after entering the plea, she learned that the information, although timely lodged with the court by the government, had not been filed until after the statute of limitations had expired.[3] The defendant raised the statute of limitations defense in the district court as soon as she learned of the facts supporting it, but the district court held that the defense was waived by her guilty plea. The court of appeals reversed, stating that "while we agree with those courts which hold a defendant can waive the statute of limitations," there was no express waiver in the case before it. 956 F.2d

---

[3] "The record indicates that the government presented the information to the court before the statute expired, but it was retained by the court's staff and not actually lodged or docketed until after Ms. Cooper's arraignment." 956 F.2d at 961 n.2.

at 962. The court concluded that "[t]he defendant simply entered a plea to a barred charge" and was entitled to relief. *Id* at 963.

While we disagree with the court's analysis in *Cooper*, the unusual facts of that case are not comparable to this case. In *Cooper*, the court noted that the defendant (as well as the government) had been "misled into believing the information had been filed timely," and concluded that in those circumstances no waiver had occurred. 956 F.2d at 960. Here, in contrast, petitioner joined in Torres-Lopez's motion to dismiss based on the statute of limitations, and he therefore cannot credibly claim that he was unaware that he was waiving the limitations defense when he pleaded guilty. Moreover, the defendant in *Cooper* raised the statute of limitations defense at her earliest opportunity, immediately after learning of the basis for it, and pursued it on direct appeal. Petitioner, however, abandoned that defense through his plea and did not renew it until after Torres-Lopez had prevailed in the First Circuit; only then did petitioner commence his collateral attack on the judgment. On the facts of this case, there is no reason to believe that the Tenth Circuit would relieve petitioner in collateral proceedings of the consequences of his guilty plea.

Petitioner's reliance (Pet. 5-6) on *United States* v. *Akmakjian*, 647 F.2d 12, 14 (9th Cir. 1981), and *United States* v. *Doyle*, 348 F.2d at 718-719, is also misplaced. In *Akmakjian*, the defendant expressly waived the statute of limitations defense and pleaded guilty, but the Ninth Circuit did not suggest that an express waiver of that defense was required. Indeed, in other contexts that court has not required an express waiver to forfeit a statute of limitations defense. See *United States* v. *DeTar*, 832 F.2d at 1115

(rejecting express waiver requirement when defendant requests a lesser-included offense instruction on a time-barred charge); *United States* v. *Minor*, 756 F.2d 731, 737 (9th Cir. 1985) (per curiam) (statute of limitations defense is waived if not timely raised in the trial court), vacated on other grounds, 474 U.S. 991 (1985). In *Doyle*, the court explicitly ruled that the defendant's guilty plea, without more, foreclosed a claim based on the statute of limitations; only as an alternative ground for decision did the court note that the defendant had expressly waived the defense. 348 F.2d at 719-720; see Pet. App. 5a.

The other cases petitioner cites are even farther afield. Most of those cases do not involve guilty pleas at all. Rather, they involve cases in which the courts held that a defendant's voluntary preindictment agreement to an extension of the statute of limitations constitutes a waiver of that defense.[4] In one other case, *Benes* v. *United States*, 276 F.2d 99, 108-109 (6th Cir. 1960), the court held that because the statute of limitations is not tolled by the government's voluntary agreement to delay prosecution, the limitations period had in fact expired. *Id.* at 109. And in *United States* v. *Levine*, 658 F.2d 113, 129 (3d Cir. 1981), the court simply "determined that the denial of the motion to dismiss on the statute of limitations

---

[4] See, *e.g.*, *United States* v. *Del Percio*, 870 F.2d 1090, 1093 (6th Cir. 1989); *United States* v. *Caldwell*, 859 F.2d 805, 806 (9th Cir. 1988), cert. denied, 489 U.S. 1039 (1989). As the court noted in *Cooper*, 956 F.2d at 961 n.3, "[t]hose cases [*Del Percio* and *Caldwell*] are irrelevant to the issue before us [involving the effect of guilty plea]." The decisions in *United States* v. *Meeker*, 701 F.2d 685, 687-688 (7th Cir.), cert. denied, 464 U.S. 826 (1983); *United States* v. *Wild*, 551 F.2d 418, 422 (D.C. Cir.), cert. denied, 431 U.S. 916 (1977), see Pet. 7, are distinguishable for the same reason.

grounds did not fall within the *Cohen* exception to 'final decisions' " and the court therefore had "no jurisdiction" to address the merits.

Even if petitioner were entitled to circumvent his guilty plea and raise a statute of limitations defense, this case does not warrant review, because petitioner's claim is without merit. The government proffered sufficient evidence at petitioner's plea proceeding to support a finding that the substantive RICO offense charged in Count 1 of the superseding indictment occurred within the limitations period. Although petitioner specifically admitted committing only two of the racketeering acts charged in that count, C.A. App. 166-167, he entered an unconditional guilty plea to the entire count, *id.* at 179, and that count alleged that petitioner participated in six racketeering acts, the latest of which, No. 17, was the September 1982 kidnapping and extortion of Mario Consuegra. *Id.* at 173-178; see *id.* at 128-129.

In connection with that predicate act, the government indicated to the court that it was prepared to prove that when one of petitioner's co-conspirators, Alejo Maldonado Medina, was arrested by the FBI (on October 26, 1982), petitioner came to his aid, helped him to arrange for legal representation, and helped him dispose of the proceeds of the kidnapping by buying some gold chains and by accepting approximately $50,000 in cash that the conspirators believed to have been marked by the police. After petitioner accepted the $50,000, he gave $25,000 in clean, unmarked bills to a co-conspirator and kept the other $25,000 as part of his share of the crime's proceeds. See C.A. App. 177. In sum, because petitioner's participation in racketeering act No. 17 took place less than five years before the indictments in the present case were returned, *i.e.*, on June 26, 1986, and

November 24, 1986, respectively, the substantive offenses charged in Count 1 of the indictment fell within the limitations period.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

THOMAS M. GANNON
Attorney

AUGUST 1992